



September 28, 2006

TO: Conservancy Members

FROM: Sam Schuchat, Executive Officer
Jack Judkins, Staff Counsel

SUBJECT: Executive Officer's Report: Conservation Easement Discussion

The Conservancy has been involved for almost a year in discussion of appropriate standards for projects involving the acquisition of conservation easements. At the Conservancy meeting of February 3, 2006, Deputy Executive Officer Steve Horn presented information on Conservancy practices related to the funding of conservation easements. A copy of the memo provided to the Conservancy is attached.

Subsequently, the Wildlife Conservation Board (WCB) convened a series of meetings with representatives of the land trust community and state agencies to cooperatively develop principles that would ensure that WCB's conservation purpose in funding an easement would remain adequately protected. Conservancy staff participated in these meetings and concurred in the consensus reached by the parties that development of an easement acquisition project funded by the State should generally be guided by five basic principles, summarized as follows:

1. Purpose: The purpose of the conservation easement should be clearly articulated in the State agency grant agreement and in the easement and be consistent with the funding source and the State agency's enabling legislation.
2. Baseline Conditions: Prior to close of escrow, a "Baseline Report", detailing and documenting the conservation values to be protected under the grant, should be prepared, provided to and approved by the State agency, and retained in the offices of the State agency.
3. Monitoring: The easement property should be regularly monitored by the easement holder for compliance, the easement holder should provide the State agency with a copy of each periodic monitoring report, and the State agency should have the right to accompany the easement holder on monitoring visits.

4. Changes to the Easement: The State agency should have the opportunity to review and approve any changes in the easement terms or any transfer to another easement holder.
5. Enforcement: If violation of the easement purpose or other essential terms or conditions occurs, the State agency should have the ability to enforce compliance.

At its meeting of August 17, 2006, WCB formally adopted these same five principles as “policies” guiding the WCB procedures for funding conservation easements. A copy of the adopted WCB policies is attached.

Historically, Conservancy staff has incorporated these principles into the development of easement projects. Since each easement acquisition project involves unique conservation values, differing funding partners and individual landowners with different interests, the manner in which these basic principles are integrated into the easement project can and has varied. Conservancy staff will continue to inform the Conservancy of the relevant features in each new easement at the time Conservancy authorization for funding of that easement is requested.

Several Conservancy members have expressed an interest in Conservancy consideration and possible adoption of similar standards. Accordingly, for the purposes of discussion at October, 2006 meeting and for possible action at a future meeting, Conservancy staff has prepared a set of proposed standards, based on these same basic principles. These standards, which have been revised from WCB’s version to reflect the requirements of the Conservancy’s enabling legislation and appropriation language, are attached. The standards are annotated so that the Conservancy’s “standards” are cross-referenced to the parallel or related WCB “policy”.

As noted above, Conservancy staff agrees that these principles should guide the development of any Conservancy funded conservation easements. It is worth remembering that each easement is negotiated with particular landowners and is thus unique. Landowners may have specific sensitivities or needs, and often there are other funders involved with varying requirements which must be harmonized. Thus, overly precise application of these standards and practices may result in the inability to take advantage of a fleeting opportunity to secure an easement that would otherwise unconditionally achieve the Conservancy’s statutory conservation objectives, because, for one reason or another, the project cannot fully meet all aspects of a particular standard. Thus, staff would recommend that any proposed standard be adopted reflecting this possible need for future flexibility.



February 3, 2006

TO: Coastal Conservancy

FROM: Steve Horn
Deputy Executive Officer

**SUBJECT: Executive Officer's Report:
Conservancy Easement Standards and Practices**

At the December 2005 meeting the Conservancy requested a discussion of the contents of conservation easements employed by and/or funded by the Conservancy pursuant to Board authorizations. This memo is intended to initiate that discussion by providing information on current Conservancy practices.

In general, the Conservancy staff believes that the grant agreement and conservation easement forms that we currently employ provide a high degree of assurance that the State will be able to enforce the terms of its agreements with easement-holders and landowners. The specific terms of conservation easements may vary with each property, but all of these easements will have some basic components as described below.

Purposes of Conservation Easements and Grant Agreements

The discussion should involve both conservation easements and Conservancy grant agreements because these documents function together where a project is being carried out by another organization using Conservancy funds.

Through its grant agreements and through conservation easements funded by those grants, the Conservancy assures that the projects that it authorizes will comply with the requirements of Division 21 of the Public Resources Code and with other State and federal statutes, administrative guidelines and procedures. The Conservancy has developed the form and content of its grant agreements

over its thirty-year history, modifying the “standard” form of these documents many times in response to new laws, changing procedures of other agencies, and the lessons of experience. Conservation easements have been produced by the Conservancy itself for dozens of direct acquisitions, and Conservancy staff members have reviewed and critiqued the easements proposed by many other agencies.

These are enforceable legal instruments intended to protect the public interest and to achieve specific public purposes. Much of the content of the grant agreements is directed at minimizing risks to the State’s interests through provisions including controls over the disbursement of funds, express limitations on tort liabilities, control over assignments or delegations of responsibility to third parties, rights of project inspection, financial auditing and early termination of the grant agreement. Much of the content of conservation easements describes the purposes intended to be achieved and the ways in which the landowner and the easement-holder will act in accord with those purposes. The property-interest rights and obligations of the landowner and the easement-holder, together with the contractual rights and obligations of the (grantee) easement-holder and the Conservancy, assure the public that the conservation protection that has been purchased will have a reasonable likelihood of permanence.

Basic Conservation Easement Components

Conservation easements used or approved by the Conservancy include the following four components:

1. Statement of Conservation Purposes: what are the conservation values to be protected, and what would be the public significance of protecting them?
2. Description of Specific Restrictions and Rights: what rights are being purchased by the easement-holder, and what rights are being retained by the landowner?
3. Compliance Monitoring: what are the rights and responsibilities of the landowner and the easement-holder in administering compliance with the purposes and specific restrictions of the easement?
4. Enforcement: what are the procedures to remedy conditions of noncompliance?

The complete easement document also includes a variety of clauses that describe

in detail the mechanics of making the easement work, including provisions for: the amendment, extinguishment or transfer of the easement; the interaction between the easement and other existing or future property interests; the formal notification procedures between the parties; the mutual understandings with respect to relevant provisions of law; and so forth. Depending upon the purpose of the easement, there may be detailed requirements concerning continuing economic activity by the landowner, such as management plans for logging or intensive agriculture.

Given these basic components, however, each conservation easement will be “unique” - - it must be tailored to the physical/administrative conditions of a specific site and to the specific purposes of the public for that site, and it must be negotiated to agreement with a landowner.

Working with Conservation Partners

The conservation easement projects funded by the Conservancy usually involve partnerships with local governments, other State agencies and/or nonprofit land trusts. Most of these organizations have experience with conservation easements and preferred ways of drafting these documents. While there is generally agreement concerning the necessary contents of conservation easements (as outlined above), the “standard” legal phrasing often varies from organization to organization. Each easement is also site-specific and consequently somewhat unique. To create a satisfactory product, in every easement project the Conservancy legal staff works to merge our forms of agreement with those of our partners. This process takes some time but it is probably not avoidable if we are to get the benefits of these voluntary conservation partnerships. It is also by this iterative process that we are able to draw upon the experiences of other agencies and thus improve our own standards.

Some of the influences that come from our conservation partners:

1. A nonprofit land trust is frequently the holder of a conservation easement and consequently the party responsible for ongoing interaction with the landowner. It follows that in creating the easement document, nonprofits are often concerned with those parts of the easement that detail the rights and responsibilities of the underlying private landowner and that specify the kinds of active oversight that will be expected of the easement-holder.

2. Other State agencies are often, like the Conservancy, in the role of funding the acquisition of easement rights by third parties - - nonprofits or local government agencies. They are concerned with clarifying the enforcement mechanisms that will protect the State's investment, and with specifying the role of State employees in monitoring compliance with the easement terms.

Conservancy Grants for Acquisition of Conservation Easements

The Conservancy is authorized to provide grants to public agencies and nonprofit organization for the acquisition of interests in land, including conservation easements. Under provisions of Division 21 of the Public Resources Code and appropriations of funds to the Conservancy in annual budget acts, the Conservancy is charged to specify essential terms and conditions of a grant and to provide for a "reversionary" interest in the State if any of these essential terms and conditions are violated. For example, Public Resources Code Section 31116 (b) requires, in the case of a grant to a nonprofit organization for land acquisition, that the purchase price not exceed fair market value of the interest acquired; that the Conservancy approve the terms and conditions under which the interest is acquired; that the interest may not be transferred or used as security for a debt without Conservancy approval; and that upon violation of any essential term or condition, title to all interest acquired with state funds immediately vest in the State. Conservancy staff ensures that all essential terms and conditions of a land-acquisition grant are specified in the grant agreement and in recorded documents that provide for this vesting in the event of a violation. In the case of conservation easements, this language is typically included within the body of the easement document. The Conservancy's right to take title to the easement, or to designate another public agency or nonprofit organization to do so, can be exercised upon violation of any of the essential terms and conditions specified in section 31116(b) or upon violation of a material provision of the conservation easement, in the event the easement-holder fails to enforce or correct the violation itself.

Continuing Improvement

The Conservancy staff is active in efforts to improve the effectiveness of conservation easements and grant agreements. Our nonprofit and public agency partners are also trying to do so.

Nonprofit land trusts have joined together to develop appropriate standards for creating and managing conservation easements. In 2004, following several years

of committee work, the national group that represents more than 1,500 land trusts, the Land Trust Alliance (LTA) based in Washington, D.C., promulgated its “Standards and Practices” guidelines. In part, those guidelines articulate how conservation easement transactions should be structured and how the nonprofit easement-holder should conduct its oversight. The principal purposes of these standards is are to enable the nonprofits to assure landowners, donors and the Internal Revenue Service that the charitable purposes of the conservation easements will be achieved, and to assure themselves that courts will enforce these permanent restrictions. The LTA conducts many training courses for nonprofits in order to facilitate these “best practices”. The standards recommended by the LTA for conservation easements and easement-holding nonprofits include many of same requisites that characterize Conservancy transactions: clear statements of conservation purposes; “baseline” studies that document the conservation values; easement stewardship plans that include regular monitoring; clarification of the responsibilities and reserved rights of the underlying landowners; and specific enforcement procedures. The LTA has recently called for all land trusts to verify their intention and ability to conduct transactions according to these standards through a process of peer-review and accreditation.

State agencies have worked individually and together to improve our “forms” for both grants and easements, in response to the requirements of specific projects and in response to external pressures. As the number of these conservation projects has increased following public approval of bond acts in 2000 and 2002, this greater public profile has resulted in greater attention and scrutiny from the press, the legislature, academic institutions, conservation organizations, and the public. The greater number of these projects, and the larger number of multi-agency projects, has provided more opportunities for discussion among the legal and project staff members of the several conservancies, the Wildlife Conservation Board, Department of Conservation, State Parks, etc.. The Conservancy staff is in on-going discussion with our colleagues concerning these matters.

There is not now any bill introduced or administrative mandate proposed that would require changes in Conservancy grant agreement and or the conservation easements that are funded by them. Our will report back to Board concerning any proposed changes that would be substantial shift from existing practice.

Wildlife Conservation Board
Policies Governing
Grant Agreements and Conservation Easements

IMPLEMENTATION AND REVIEW OF POLICIES

It is the policy of the Wildlife Conservation Board that:

The Wildlife Conservation Board (WCB) shall establish and regularly review policies to ensure public confidence and accountability in grant agreements and conservation easements purchased with grant funds approved by the WCB. Exceptions to these policies are to be approved by the WCB.

Adopted: 08/17/06.

GRANT AGREEMENTS

It is the policy of the Wildlife Conservation Board that:

Staff shall develop standard grant agreements designed to allocate fiscal resources and facilitate the completion of projects. Grant agreements shall be consistent with the policies established by the WCB and clearly state the purposes of the conservation effort. The defined purposes must, at a minimum, articulate and be consistent with the purposes and requirements of the funding source(s) used to pay for the conservation effort and identify the resources and conservation values to be protected. The defined purposes of the grant must also be included in the appropriate conveyance documents (deed or conservation easement).

Adopted: 08/17/06.

RETENTION OF DOCUMENTS

It is the policy of the Wildlife Conservation Board that:

Approved appraisals, conformed copies of recorded conveyance documents, title reports and title policies, baseline conditions reports, transaction documents, management plans, and monitoring reports, as applicable, shall be provided to the WCB and retained in the WCB offices.

Adopted: 08/17/06.

BASELINE CONDITIONS REPORT

It is the policy of the Wildlife Conservation Board that:

Prior to the close of escrow for the acquisition of a conservation easement purchased with funds approved by the WCB, WCB shall have approved documentation providing detailed information on the condition of the property to be protected. The documentation (Baseline Conditions Report) shall be tailored to the purposes of the grant and the specific conservation values to be protected by the conservation easement. Descriptions of the condition of the property and conservation values should be sufficiently detailed to allow for meaningful future comparisons.

The Baseline Conditions Report must be completed, signed, and certified by the landowner(s) and the grantee by the close of escrow. The certification must confirm that the Baseline Conditions Report is a current and accurate description and representation of the property, the health of its resources and conservation values as of the closing.

The Baseline Conditions Report shall provide a narrative that characterizes the overall general condition of the conservation values protected by the conservation easement. For purposes of baseline documentation, the report must provide descriptions that are clearly defined and sufficiently detailed to allow for meaningful future comparisons and must: (a) describe and document the features and characteristics of the property in relation to the purposes, conservation values, and terms of the conservation easement at the time the conservation easement is granted; (b) describe and document the conservation values and resources to be protected by the conservation easement; (c) contain all information necessary for the grantee to administer, monitor and enforce the conservation easement; and (d) include a copy of the recorded conservation easement. The grant agreement shall include minimum requirements for the content of a Baseline Conditions Report.

Adopted: 08/17/06.

MONITORING GRANTS AND CONSERVATION EASEMENTS

It is the policy of the Wildlife Conservation Board that:

- I. Compliance monitoring shall assess compliance with the terms of the conservation easement and grant agreement and note any changes to the property as compared to the Baseline Conditions Report and the prior monitoring report.
- II. Prior to the close of escrow for the acquisition of a conservation easement purchased with funds approved by the WCB, WCB shall have approved an individualized monitoring protocol for the property to be protected. Using the Baseline Conditions Report as a benchmark, the monitoring protocol should be adaptive and address the purposes, frequency, timing and methods of monitoring the property to be carried out by the grant recipient (grantee). The monitoring protocol is the framework that will guide the preparation for and implementation of the grantee's monitoring of the conservation easement.
- III. The monitoring protocol must be tailored to address the purposes, terms and conditions of the conservation easement and the purposes of grant. The grant agreement shall include minimum requirements for a monitoring protocol and describe a process for amending the protocol as necessary, over time.
- IV. All grant agreements shall require the grantee to monitor land protected with a conservation easement purchased with funds allocated by the WCB. The grantee shall monitor the property at least annually to assess compliance with the terms and conditions of the conservation easement, as well as whether the purposes of the conservation easement and the grant agreement are being met. The grantee shall provide a written report of its monitoring activities and the results of such monitoring to the WCB in accordance with the approved monitoring protocol. The monitoring report shall document and describe the monitoring activities in a manner that demonstrates the monitoring was conducted in accordance with the monitoring protocol approved by the WCB.
- V. At the request of the WCB, not less than once, in any period of three calendar years, the grantee shall arrange for the WCB to access the protected property to assess compliance with the terms, covenants and conditions of the grant agreement. To the extent possible, such visits will be scheduled at the time of the grantee's annual monitoring visit.

Adopted: 08/17/06.

EASEMENT TRANSFERS AND EXTINGUISHMENT

It is the policy of the Wildlife Conservation Board that:

- I. The grant agreement shall contain language that requires WCB to approve the transfer of any conservation easement.
- II. The landowner and the easement holder cannot voluntarily extinguish the conservation easement. Conservation easements whether in whole or in part, can only be extinguished through appropriate legal proceedings (e.g., eminent domain).

Adopted: 08/17/06.

DEFAULT AND REMEDIES

It is the policy of the Wildlife Conservation Board that:

Grant agreements are to include remedies, which the WCB may exercise if any essential term or condition of the agreement is violated. Remedies must include, but are not to be limited to, the right to seek specific performance of the grant agreement and the right to require the Grantee to transfer its interest in the conservation easement to the state or a qualified third party, as the WCB may elect.

Adopted: 08/17/06.